STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 26, 2002
v	No. 226953 Oakland Circuit Court
SCOTT GARRETT CANFIELD, Defendant-Appellant.	LC No. 99-169461-FC

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and sentenced to ten to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant claims that there was insufficient evidence of personal injury to support his conviction for first-degree CSC under MCL 750.520b(1)(f). In reviewing this issue, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

A person violates MCL 750.520b(1)(f) if he "causes personal injury to the victim and force or coercion is used to accomplish sexual penetration." *People v Cowley*, 174 Mich App 76, 80; 435 NW2d 458 (1989). Personal injury is defined as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(j). Bodily injury, mental anguish, and the other conditions listed in the statutory definition of personal injury "are merely different ways of defining the single element of personal injury" and "should not be construed to represent alternative theories upon which jury unanimity is required." *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Thus, if sufficient evidence is presented establishing any one of the listed definitions, the personal injury element has been proven. *Id.*

To satisfy the personal injury element of the statute, a physical injury need not be permanent or substantial. *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). In *People v Himmelein*, 177 Mich App 365, 377-378; 442 NW2d 667 (1989), this Court stated:

> We decline defendant's invitation to announce a new standard for evaluating the severity of bodily injury that would be analogous to the standard of "extreme or excruciating pain, distress, or suffering of the mind" set forth in [*People v*] *Petrella*, [424 Mich 221, 257; 380 NW2d 11 (1985).] The *Petrella* holding recognized and resolved the inherent ambiguity of mental anguish as an aggravating factor elevating criminal sexual conduct from the third to the first degree. . . . Bodily injury, viewed as an aggravating factor, does not share in this inherent ambiguity. Given the absence of any statutory indication of a more stringent standard than that previously applied by this Court, we find the present standard for bodily injury to correctly reflect the legislative judgment that evidence of even insubstantial physical injuries is sufficient to support a conviction for criminal sexual conduct in the first degree. [177 Mich App 377-378].

To prove "mental anguish" within the meaning of MCL 750.520a(j), "the prosecution is required to produce evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind." *Petrella*, *supra*, 424 Mich 257, The following factors may be considered in determining whether mental anguish has been proven beyond a reasonable doubt:

> (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.
>
> (2) The need by the victim for psychiatric or psychological care or treatment.
>
> (3) Some interference with the victim's ability to conduct a normal life, such as absence from the workplace.
>
> (4) Fear for the victim's life or safety, or that of those near to her.
>
> (5) Feelings of anger and humiliation by the victim.
>
> (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
>
> (7) Evidence that the emotional or psychological effects of the assault were long-lasting.
>
> (8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack.
>
> (9) The fact that the victim was the assailant's natural father. [*Petrella, supra* at 270-71.]

In this case, the victim testified that defendant choked her, leaving abrasions on her right shoulder, and medical testimony confirmed that the victim suffered abrasions on her shoulder and at the entrance of her vagina. Viewed in a light most favorable to the prosecution, this

evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the victim suffered a bodily injury under MCL 750.520a(j).

In addition, there was sufficient evidence that the victim suffered mental anguish. Specifically, the victim testified that she was scared during the sexual assault, and was hysterical and crying afterwards. The responding police officer also testified that the victim was very upset and crying, and appeared to be very shaken. The emergency room physician who examined the victim following the assault also described her as anxious and occasionally tearful. Furthermore, the victim testified that, as a result of the sexual assault, she would cry at work, that she had a hard time concentrating, her work productivity suffered, and she was required to take time off from work due to the emotional effects of the assault. The victim also testified that, following the assault, she felt scared and temporarily moved out of her apartment, had nightmares, had trouble eating and sleeping, and found it difficult to trust men. The victim's boyfriend also testified that the victim's behavior changed after the assault and that she was less loving and more distrustful. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that the victim suffered mental anguish within the meaning of MCL 750.520a(j). Accordingly, there was sufficient evidence to support defendant's conviction of first-degree CSC.

Next, defendant argues that his due process rights were violated when, after being bound over on a reduced charged of third-degree CSC, the case was dismissed without prejudice and then later reinstated on the original charge of first-degree CSC. We disagree.

Following a preliminary examination, defendant was bound over for trial on a reduced charge of third-degree CSC after the district court concluded that there was insufficient evidence of personal injury to sustain the first-degree CSC charge. When defendant was arraigned in circuit court, he moved to dismiss the charge after refusing to consent to the prosecutor's request for an adjournment to obtain DNA test results. The trial court granted defendant's motion to dismiss, without prejudice.

The prosecutor later issued another warrant, again charging defendant with first-degree CSC. A second preliminary examination was conducted before the same district judge who heard the first examination. The parties stipulated to the victim's original preliminary examination testimony. In addition, the prosecutor presented the testimony of the emergency room physician who examined the victim after the assault, and the police officer who responded to the complaint. Further, the victim gave additional testimony regarding the mental anguish she suffered as a result of the assault. Based upon this new evidence, the district court concluded that there was sufficient evidence of personal injury and, accordingly, bound defendant over for trial on the charge of first-degree CSC.

After defendant was arraigned in circuit court, he moved to reinstate the prior charge of third-degree CSC or quash the information. Defendant argued that, because the prosecutor did not appeal the dismissal of the third-degree CSC charge from the original bindover, the prosecutor could not seek a new warrant to reinstate the CSC-I charge and the district court did not have jurisdiction to conduct a second preliminary examination on a new charge of first-degree CSC. Rather, defendant claimed that the prosecutor's only alternative was to reinstate the original information charging him with third-degree CSC. The trial court denied defendant's motion.

On appeal, defendant again argues that his due process rights were violated when a second preliminary examination was conducted after his case was dismissed following his bindover on the third-degree CSC charge. US Const, Am XIV; Const 1963, art 1, § 17.

This same issue was addressed in *People v Robbins*, 223 Mich App 355, 358-63; 566 NW2d 49 (1997), wherein this Court rejected the defendant's argument that the prosecutor could recharge the defendant only if there was newly discovered evidence to warrant the charge. In *Robbins*, this Court interpreted MCR 6.110(f), which provides:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge. [223 Mich App 359-360].

In *Robbins*, this Court determined that the plain meaning of the phrase "additional evidence" was not synonymous with "newly discovered evidence." Thus, the Court in *Robbins* held:

> Therefore, in accordance with the plain meaning of the language of the court rule, we find that the prosecution may reinstate the charges against a defendant where it seeks to present "additional evidence" at the second examination to the same magistrate who presided over the defendant's preliminary examination. The rule's reference to "additional evidence," rather than to "newly discovered evidence," must be regarded as an intentional choice by the Supreme Court not to require that a subsequent examination be based on newly discovered evidence. When the Supreme Court desires to require newly discovered evidence, it does so by using that precise terminology. See, for example, MCR 2.612(C)(1)(b).
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> The reference to "additional evidence" in MCR 6.110(F) redresses a problem identified by this Court in *People v Nevitt*, 76 Mich App 402, 403-404, 256 NW2d 612 (1977), where after dismissal of the charges at the conclusion of the first preliminary examination, the prosecutor recharged the defendant on the same evidence, before a different magistrate, and succeeded in obtaining a bindover following a second preliminary examination. Although this Court found the prosecutor's tactics offensive and characterized the prosecutor's methods as "judge shopping," it felt constrained to affirm the bindover, noting that "[i]f the prosecutor is of the opinion that the examining magistrate erred in not binding the defendant over for trial, the better approach is to appeal to the circuit court." *Id*.
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> We agree that when the same evidence is relied on at a subsequent examination, appeal is the proper remedy. MCR 6.110(F) prevents "judge shopping" by requiring that a subsequent examination be before the same magistrate, if available, and that additional evidence be presented. In this case, the prosecution's tactics were not offensive where it sought to introduce additional evidence at a subsequent examination before the same magistrate.

> Moreover, we agree with the prosecution that the effect of the lower court's ruling is to give double jeopardy protection where none exists. In *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965), the Supreme Court stated:
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> > The discharge by an examining magistrate upon examination of a person accused of a crime is not a bar to his subsequent arrest, examination, and trial for the same offense because he has not been placed in jeopardy. [*Robbins*, *supra* at 361-362.]

In *Robbins*, this Court concluded that reinstatement of the charges against the defendant did not violate due process "because the prosecution sought to present additional, noncumulative evidence at the second examination to the same magistrate who presided over defendant's preliminary examination." *Id*. at 362. This Court added, however, that its "holding should not be construed to encourage a prosecutor to subject a defendant to repeated preliminary examinations[,]" and that "subjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping.'" *Id*. at 363.

Although defendant urges this Court to reject the reasoning of *Robbins*, we reaffirm it as controlling authority under MCR 7.215(I)(2) and (3).

Applying *Robbins* to this case, it is apparent that defendant's due process rights were not violated. First, there is no indication of "judge-shopping" because the second preliminary examination was conducted before the same district court judge who conducted the first examination. Moreover, at the second preliminary examination, the prosecutor presented new and additional, noncumulative evidence that the victim suffered a "personal injury" as a result of the sexual assault.

Furthermore, because jeopardy had not yet attached before the first case was dismissed, reinstatement of the original first-degree CSC charge at the second preliminary examination did not violate defendant's double jeopardy protections. See *Robbins*, *supra* at 362. Additionally, because it was not improper for the prosecutor to reinstate the original charge where defendant was afforded a preliminary examination before the same district court judge and additional, noncumulative evidence was presented supporting the higher charge, there is no merit to defendant's claim that the prosecutor engaged in misconduct by seeking to reinstate the original charge.

Finally, we reject defendant's claim that his attorneys were ineffective in their handling of this issue. *Bell v Cone*, 535 US ___; 122 S Ct 1843, 1850; 152 L Ed 2d 914 (2002); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant's first attorney was not ineffective for failing to challenge the trial court's decision to dismiss the case without prejudice, rather than with prejudice, given that the trial court dismissed the case for procedural reasons. Any objection would have been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Similarly, because defendant's second attorney had no valid basis for opposing reinstatement of the original first-degree CSC charge on double jeopardy grounds, *Robbins*, *supra*, he was not ineffective for failing to do so.

Defendant also argues that he was denied a fair trial because of misconduct by the prosecutor during closing argument. Because defendant failed to preserve this issue by objecting to the allegedly improper remarks below, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 76 (2002); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant challenges the following remarks made during the prosecutor's closing argument:

> In this case, the Defendant used sex for his own pleasure. He wanted it, he wanted it from the victim. He needed somebody to dominate over, and that's exactly what he did. Rape is an ugly crime. It desecrates the soul, it violates the body, it traumatizes an individual who is the victim, as in this case, of it. It's a crime of anger, it's a crime of violence. This was uncalled for, unjust sexual invasion of this young woman's body.
>
> Now, what separates making love, what separates voluntary sex from this is the concept of mutuality, the willingness of two individuals in a setting to make love, and when you add love, you add caring, that's what separates us as human[s] from animals. Animals, on the other hand, they assert their will over the lesser victim, as was done in this case by the Defendant.

Defendant claims that it was improper and demeaning to equate him with an animal, because "even those accused of felony offenses are to be treated as human beings." The prosecutor's remarks were intended to convey that defendant's sexual assault of the victim was nonconsensual. Considered in context, we find no plain error.

We also disagree with defendant's claim that the prosecutor's comments during rebuttal argument constituted an improper appeal to the jurors' sense of rage or civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Viewed in context, it is clear that the prosecutor was responding to defense counsel's plea that, at most, the jury should convict defendant of only third-degree CSC on the basis that the evidence did not show that the victim suffered a personal injury. The prosecutor, after recounting the evidence showing that the victim had suffered both a bodily injury and mental anguish, was asking the jury to apply the law and find that the evidence was sufficient to convict defendant of first-degree CSC. Furthermore, the prosecutor did not misstate the law by remarking that "a verdict of not guilty is saying . . . [the victim] didn't suffer mental anguish . . . didn't suffer any injury." Viewed in context, the prosecutor was merely arguing that the evidence established defendant's guilt of first-degree CSC, as defined under the law.

Finally, because the prosecutor's remarks were proper, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper